



ranch land by a non-profit organization. The State is represented by Assistant Attorney General Charles M. Carvell.

Crosslands is represented by attorney C. Nicholas Vogel. Thomas C. Dillon, local attorney for Crosslands, has also appeared in this case and presented arguments and testimony. Crosslands resists the State's attempt to divest it of the land it has acquired in the three counties in the state of North Dakota and specifically requests that the State's lawsuit be dismissed with prejudice. Alternatively, Crosslands seeks an order from the Court that the anti-corporate farming provisions in N.D.C.C. Chapter 10-06.1, including specifically Section 10-06.1-10, violate the dormant Commerce Clause of the United States Constitution. Additionally and alternatively, on an interim basis, before deciding the constitutional issue, Crosslands suggests the Court schedule another hearing to determine which portions of the Griggs County and Cavalier County land qualifies under the business purpose exemption, set forth in N.D.C.C. 10-06.1-07. Collectively, Crosslands raises five non-constitutional issues relating to one or more of the three county acquisitions and one general constitutional issue.

#### CASE SUMMARY

Initially, the State filed a motion for summary judgment which was resisted by Crosslands. The Court held a hearing on that matter and after considering the written briefs submitted by both parties, the Court entered a memorandum opinion and order in August 2005, continuing the matter for six months to allow the parties to conduct further discovery and finalize their filings with the Court, as deemed relevant. Upon completion of that discovery, the Court ordered that the parties would contact the Court to determine whether further briefing is necessary and whether or not the Court should rule on the

motion for summary judgment based on the record at that time, including any additional affidavits filed during the discovery period, or consider the positions of the parties and schedule as deemed appropriate and make a final determination on the motion for summary judgment.

In January of 2006, pursuant to the agreement of the parties, the Court extended the deadline for completing discovery. The Court entered a third order for deadline extension and an order for telephonic status hearing, pursuant to the request of the parties, in February of 2006. After a status hearing was held in April 2006, the Court entered an order continuing the case at the request of the parties. Given the complexity of the case, the parties gave the Court an update on their discovery efforts and informed the Court that there was a need to conduct additional trial preparation work before the case could be presented to the Court.

The parties considered submitting a stipulation of facts to the Court in hopes that issues could be resolved by summary judgment. In the fall of 2006, the parties informed the Court of the status and efforts to prepare a joint stipulation of facts and their view on how the case could best be determined. In late December 2006, a stipulation was agreed to between the parties, which consisted of fifty-nine (59) stipulated facts, dated December 20 and December 21, 2006. The stipulation related to certain evidence which was set forth in three different appendixes (A, B, and C). In February of 2007, the parties submitted to the Court their first supplemental stipulation, which included certain exhibits which would be admitted for the Court's consideration without further foundation. The Court has considered the Stipulation and First Supplemental Stipulation and specifically incorporates and adopts as part of this Memorandum Decision all stipulated facts set forth

in those stipulations as findings of fact in this case. The Court also specifically incorporates and adopts the conclusions of applicable law set forth in those stipulations as conclusions of law in this case.

In February 2007, there was an evidentiary hearing held, at which time the Court considered the testimony of Carolyn Kvislen, Thomas Dillon, Bethany Kurz, Harold Duebbert, and Rodvy Ustipak. The parties were represented by their counsel, Thomas Carvell and C. Nicholas Vorgel. The Court also received several additional exhibits in addition to what was presented to the Court previously. There was some difficulty regarding the obtaining of a transcript of that hearing. The parties needed the transcript to complete the briefing of the case. A stipulation regarding the transcript was entered into between the parties in May 2007, and the Court has now received and considered the transcript of the February 23, 2007 hearing with that stipulation, as prepared in April 2007.

Both parties filed post-trial briefs and post-trial reply briefs. The Court has considered the entire record, including the above noted stipulation of facts and law, evidence and exhibits presented at the hearing, arguments of counsel, and the briefs submitted by counsel setting forth the positions of each respective party. The Court also notes that pursuant to a letter of December 2006, received by the Court from Assistant Attorney General Carvell, and approved by counsel Vogel, the parties stipulated and agreed that pursuant to the proposal that had been set forth by the parties, in regard to the stipulated facts and the hearing to be held, the still pending summary judgment motion would be deemed moot and all issues in the case would be decided on the 2006 stipulation of facts and 3 appendixes, evidence received at the hearing, and the briefs and

prior affidavits already before the Court and any oral argument the Court allowed. The Court has so considered all of that information pursuant to the agreement of counsel and approval of the Court. In February, 2009, the Court provided both counsel a “summary of the Court’s determination.” In accordance with that summary determination (Number 4 regarding the Griggs County land), the Court scheduled a supplemental hearing for March 12, 2009. The Court held that hearing and did receive evidence, including several exhibits, and heard the arguments of counsel. The parties were given a timeframe to submit any supplemental briefs, but neither party submitted any further brief. The Court has considered the evidence presented and arguments of counsel in its final determination regarding the Griggs County land.

#### LAW AND ANALYSIS

#### N.D.C.C. CHAPTER 10-06.1 – CORPORATE OR LIMITED LIABILITY COMPANY

#### FARMING

Chapter 10.06.1 of the North Dakota Century Code relates to corporate or limited liability company farming. The statute is commonly called the anti-corporate farming legislation. It was originally passed in 1932 and revised several different times by the state legislature. That statute generally prohibits corporations both from owning or leasing farmland used in farming or ranching operations and from engaging in the business of farming or ranching, except in certain circumstances.

**Farming or ranching** is defined in N.D.C.C. 10-06.1-01(1) to mean cultivating land for production of agriculture crops or livestock or the raising or producing of such livestock or livestock products, poultry, milk, dairy, fruit, or horticultural products. It

does not include production of timber or forest products. It is silent as to whether or not it includes or does not include wetlands or other certain types of property.

The act does include non-profit organizations. There is no dispute in this case that Crosslands is a valid North Dakota non-profit organization and that it was in existence on December 31, 1984 and organized for purposes of the Internal Revenue Service code under Section 501(c)(3). This lawsuit basically revolves around the ability of Crosslands as a non-profit organization to acquire certain land and whether or not their acquisition of the land in Ward, Griggs, and Cavalier Counties was in violation of N.D.C.C. 10-06.1. Specifically, the State seeks an enforcement order from the Court under N.D.C.C. 10-06.1-24 that Crosslands obtained the land in violation of N.D.C.C. 10-06.1 and that the Court have Crosslands divest itself of such property, as allowed in the statute, and pay and be subject to civil penalties, if they fail to comply with the Court's order, or alternatively to be dissolved or terminated by the Secretary of State.

There are basically two exceptions to allow corporations to farm or ranch in North Dakota. Under one exception, family run and family owned corporations that meet the requirements of N.D.C.C. 10-06.1-12, may farm or ranch as a family corporation under certain guidelines.

The second exception and the general prohibition against corporate farming was the one set forth in N.D.C.C. 10-06.1-10, adopted in 1985, and which is the subject of this lawsuit. Under the stipulated facts and other evidence presented to the Court, there is no dispute that Crosslands is a qualified charitable organization, as defined in N.D.C.C. 10-06.1(10)(1), and thus is initially authorized to acquire farmland or ranchland in North Dakota. The second section of the statutory scheme relates to non-profit organizations

**acquiring** farmland or ranchland. Pursuant to N.D.C.C. 10-06.1-10(2), the property may be acquired only for the purpose of conserving natural areas and habitats for biota, and, after acquisition the land must be maintained and managed for the purpose of conserving natural areas and habitats for biota and that any agricultural use of the land must be in accordance with the management of the land for conservation and agricultural use. It is clear that based on the stipulated facts and evidence presented to the Court, Crosslands meets that requirement as well. There are only four or five other non-profit organizations which meet these first two criteria. It should also be noted that in regard to the second criteria relating to non-profit organizations acquiring land for the purpose of conserving natural areas and habitats does not use the word “**purchased**”. Rather, **purchases** of farmland or ranchland are specifically limited to N.D.C.C. 10-06.1-10(3). That section restricts the acquisition of farmland or ranchland by these select non-profit corporations and sets up a detailed procedure which requires a non-profit corporation to obtain prior approval from the governor before any farmland or ranchland in North Dakota may be “**purchased**”. Under the third section, if a designated non-profit organization is going to purchase property for the purpose of conserving natural areas and habitats for biota, the governor must approve the proposed acquisition. The organization is to first submit a proposed acquisition plan to the agricultural commissioner, who convenes an advisory committee-natural areas acquisition advisory committee (NAAAC). That committee is to then hold a public hearing in conjunction with the board of county commissioners in the county where the proposed acquisition is located. The committee then makes recommendations to the governor within forty-five days after receipt of the proposed

acquisition plan. The governor then has the final decision on whether to approve or disapprove the proposed acquisition plan or any part.

In regard to N.D.C.C. 10-06.1-10(3), and based on the stipulated facts and evidence presented to the Court, it is uncontroverted that Crosslands did not, and has not ever, submitted a proposed acquisition plan or consideration by the NAAAC and governor regarding the Ward County land. It is also uncontroverted that in 2003 Crosslands bought 950 acres in Griggs County, without first satisfying the acquisition requirements of N.D.C.C. 10-06.1-10(3). However, after the purchase, Crosslands did proceed with submitting a proposed acquisition plan, which was then considered as noted in the stipulations and evidence presented to this Court. Ultimately, the governor denied the acquisition, but Crosslands did not divest as requested by the governor. Lastly, in regard to the Cavalier County 480 acres purchased in 2004, Crosslands did follow the acquisition process by submitting the acquisition plan prior to purchasing the Cavalier property. Again, the NAAAC recommended that the acquisition be denied and Governor Hoeven did ultimately disapprove the acquisition. Nevertheless, Crosslands still bought the land in Cavalier County. Ultimately, on the basis of Crosslands not complying with the gubernatorial consent requirements and the state believing it had not properly acquired the property, this lawsuit was commenced.

#### WARD COUNTY PROPERTY

December 11, 1985, Crosslands acquired ownership of 320 acres of land located in the SE ¼ of Section 7-155-86 and the SE ¼ of Section 12-155-87 in Ward County, North Dakota. There is no dispute that Crosslands acquired that property for the purpose of maintaining and preserving natural areas and habitat for migratory waterfowl and other



wildlife. There is also no dispute that Crosslands, since taking title, has maintained and managed the land in Ward County and also the later noted land in Griggs and Cavalier County for the purpose of conserving the natural habitat for waterfowl and other wildlife, and that in all three counties Crosslands did acquire the property for the purpose of maintaining and preserving natural areas and habitat for migratory waterfowl and other wildlife, in accordance with N.D.C.C. 10-06.1-10(2). There is also no dispute that in the acquisitions of the land in all three counties, Crossland is an eligible nonprofit organization that can own farmland or ranchland in North Dakota, in accordance with N.D.C.C. 10-06.1-10. The actual issue regarding the Ward County land is whether or not the transfer was a gift, which would be an allowable acquisition by Crosslands, or whether it was a purchase, which would then require the purchase to be approved within the parameters of N.D.C.C. 10-06.1-10(3).

There is no dispute that in all of these acquisitions, James Cook is the principal person involved in setting up Crosslands and funding its operations. In June, 1984, Mr. Cook bought the Ward County land from the Bernice Waldref Estate for \$89,607.00. In October 1984, Cook set up Crosslands as a nonprofit organization under Section 501(c)(3). He also established another Minnesota nonprofit corporation named DJT Foundation. Crosslands and DJT Foundation were set up to preserve and manage migratory waterfowl habitat, with Crosslands being in North Dakota and DJT in Minnesota. In December of 1984, Cook signed a deed transferring the Ward County land to the DJT Foundation. There is no dispute that at the time of the conveyance Cook's actual intention was to convey the Ward County land to Crosslands, the North Dakota corporation, since it was his intention to have the North Dakota corporation manage and

maintain North Dakota properties, not Minnesota properties. While the deed recited the consideration paid was \$89,607.00, DJT did not pay such amount for the property. Instead, it was a charitable gift for which Cook was paid nothing and for which he took a charitable deduction for the \$89,607.00 on his individual personal income tax.

In December of 1985, Tom Dillon, an attorney for Mr. Cook, discovered the Ward County land had mistakenly been transferred to the Minnesota corporation rather than the North Dakota corporation and he prepared a deed correcting the mistake by having the DJT Foundation transfer the Ward County land to Crosslands. Again, the deed stated the consideration was \$89, 607.00. Crosslands' position is that there was in fact no payment for any consideration made by Crosslands for the property to DJT Foundation or others. Having considered the record and the testimony, the Court agrees and finds that in fact there was no payment or consideration made by Crosslands for the property when it was granted title from DJT Foundation. The Court finds that it specifically was a gift and thus, the provisions of N.D.C.C. 10-06.1-10(3) are not applicable since this was not a purchase. Even though the Ward County land is considered farmland or ranchland, Crosslands was not required to go through the application process hearing, NAAAC review, and gubernatorial approval process. Crosslands is entitled to retain this property and does not have to divest itself of the Ward County property.

#### GRIGGS COUNTY PROPERTY

In November 2003, Crosslands acquired 949 acres of land in Sections 10 and 11 of Township 147, Range 59, consisting of 149 acres in the NE  $\frac{1}{4}$  of Section 11; 320 acres in the W  $\frac{1}{2}$  of Section 11; 320 in the W  $\frac{1}{2}$  of Section 10; and 160 acres in the NE  $\frac{1}{4}$  of

Section 10, in Griggs County. As noted previously, Crosslands acquired that property for the purpose of maintaining and preserving natural areas and habitat for migratory waterfowl and other wildlife and have since taking title maintained and managed that land for the purpose of such conservation. The state has challenged their purchase and continued ownership for Crosslands' failure to comply with the requirements of N.D.C.C. 10-06.1-10(3), since they did not obtain the necessary approvals by the Governor to acquire those acquisitions before purchase. At the time Crosslands acquired the Griggs County land, 260.6 acres of the Section 10 land and 232.2 of the Section 11 land were enrolled in the Federal Conservation Reserve Program (CRP). Those contracts were originally signed in 1997 and 1998 and continue through 2012 and 2013 respectively. During the time that Crosslands has owned the Griggs County land, the CRP portion has not been cultivated for production of agricultural crops or used for livestock, pasture, or any other farming operations. Prior to the lands' enrollment in CRP, its non-wetland portions were used for agricultural purposes, including cropland, hay land, and pasture for livestock.

At the time of Crosslands' acquisition, in addition to the above noted CRP land, there were approximately 165 acres (85 acres in Section 10 and 80 acres in Section 11) which constituted wetlands that were under water and unsuitable for the production of crops or the raising of hay for livestock and were not at the time being used for that purpose. Since Crosslands' acquisition of the Griggs County land, some of it has been used for agricultural purposes. An area used for an alfalfa field prior to Crosslands' acquisition continued to be used as an alfalfa field in 2004, 2005, and 2006. Crosslands allowed a 160 acre tract to be used in 2004, 2005, and 2006 by a neighboring farmer as a

cattle pasture. Crosslands has also allowed small portions of the Griggs County land to be hayed. The use of the property for haying and pasture provides benefits to wildlife inhabiting the area.

Crosslands does not dispute that at the time it first acquired the Griggs County land in November of 2003, Crosslands did not follow the procedure set forth in N.D.C.C. 10-06.1-10(3), and did not obtain the Governor's approval for the purchase. However, both parties acknowledge that in late 2003, when the state became aware of Crosslands' ownership interest in the Griggs County land, the state sent a letter dated December 22, 2003, notifying Crosslands that the state considered Crosslands to be in violation of the above noted section of the corporate farming law. There were discussions between Crosslands and Assistant Attorney General, Paul Germolus, in early 2004 suggesting to Crosslands that the problem might be resolved by filing a retroactive application with the Department of Agriculture. The Assistant Attorney General provided Crosslands with a copy of the prior application of another nonprofit organization for Crosslands to use as an example of a proposal that had previously been filed with the state. They also suggested resolving the issue by Crosslands divesting title and then filing the NAAAC application, or transferring the land to an owner such as James Cook, as an individual who could own the land under the corporate farming law.

Eventually in July 2004, Crosslands did submit the acquisition proposal for the Griggs County land. NAAAC considered it as if it had been timely filed. On August 18, 2004, in Cooperstown, NAAAC held a hearing and took testimony on the Crosslands' Griggs County acquisition proposal. On September 2, 2004, NAAAC held a meeting to consider the application. By a vote of 6 to 1 the committee voted to recommend that the

Governor not approve the acquisition. The recommendation was forwarded to the Governor. On September 15, 2004, Governor Hoeven sent a letter to Crosslands informing Crosslands he would not approve the application. The reason given by the Governor was that “the law does not authorize the purchase of farmland by a corporation that does not follow the prescribed process, nor does the law make any provision for the retroactive approval of such purchases.” Crosslands has not divested its interest in regard to the Griggs County land and at the time of the hearing on this matter still held title to the Griggs County land.

Crosslands contends that there is a factual issue as to whether all of the Griggs County land should be treated as “farmland or ranchland” as defined in N.D.C.C. Chapter 10-06.1, to which N.D.C.C. 10-06.1-10(3) would be applicable and governing Crosslands purchase of the Griggs County land. The parties have also stipulated that the acquisition of the Griggs County land also raises a substantive issue involving whether or not the reason given by the Governor for eventually rejecting Crosslands’ application for approval to purchase the Griggs County land was proper.

N.D.C.C. 10-06.1-01(1) defines “**farming or ranching**” to mean cultivating land for production of agricultural crops or livestock, or the raising or producing of livestock or livestock products, poultry or poultry products, milk or dairy products, or fruit or horticultural products. It does not include production of timber or forest products, nor does it include a contract whereby a processor or distributor of farm products or supplies provides grain, harvesting, or other farm services. N.D.C.C. 10-06.1-10 provides that farmland or ranchland may be acquired by certain nonprofit organizations. That section does not use the terms “farming or ranching” but rather “farmland or ranchland.” The

state contends that Crosslands violated the corporate farming law requiring an approval for purchases of farmland or ranchland under N.D.C.C. 10-06.1-10(3). Crosslands contends that it should be allowed to retain substantial portions of the Griggs County land for three reasons.

1. The Governor, in rejecting Crosslands' application to acquire the Griggs County land, pursuant to his letter of denial of September 15, 2004, made an arbitrary and capricious decision and the Court should find it to be invalid.

2. The statute's prohibitions against acquiring "farmland or ranchland" do not apply to portions of Griggs County land that consist of semi-permanent Class IV wetlands and non-farmable, highly eroded land.

3. That N.D.C.C. 10-06.1-07 allows Crosslands to retain some of the farmland and ranchland adjacent to the Class IV wetlands and highly eroded land to which the statute does not apply, since the adjacent land is being used to carry out Crosslands' charitable purposes.

#### ANALYSIS OF REASON 1

In his September 15<sup>th</sup> letter of denial, Governor Hoeven noted the committee gave its recommendation that the approval of the acquisition in Griggs County by Crosslands be denied. He noted that North Dakota law prohibits corporate ownership of farmland and ranchland, except with certain specific exceptions, including acquiring the farmland or ranchland only in accordance with N.D.C.C. 10-06.1-10(3), which requires the Governor's approval of the proposed acquisition before the farmland or ranchland may be purchased. He noted the law does not authorize the purchase of farmland by a corporation that does not follow the prescribed process, nor does the law make any

provision for the retroactive approval of such purchases. Accordingly, he disapproved the acquisition proposal of Crosslands. Crosslands contends this is not appropriate since the NAAAC considered the application to have been timely filed at the hearing, but none the less voted to deny the application and sent a negative recommendation up to the Governor. Crosslands contends that telling Crosslands it could go through the procedure set forth in Section 3 of the above noted law after the purchase on a retroactive basis and then rejecting the application to allow the purchase because they did not go through the procedures before it brought the property is at best arbitrary and capricious. The Court disagrees and finds that regardless of the prior procedure or contact between the Attorney General's office and Crossland, the Governor was within his discretion to consider, as he has the final determination, that the acquisition was not in compliance with N.D.C.C. 10-06.1-10(3) because, in fact, no proposed acquisition had been approved by him before the farmland or ranchland was purchased by Crosslands. The Court does not find that to be an arbitrary and capricious determination and the Court upholds the Governor's determination as proper.

#### ANALYSIS FOR REASON 2

The statutory prohibition against corporate ownership of land in North Dakota applies only to "land used for farming or ranching" as set forth in N.D.C.C. 10-06.1-02. As noted above, "farming or ranching" is defined in N.D.C.C. 10-06.1-01 and N.D.C.C. 10-06.1-10, relates to acquiring or purchasing "farmland or ranchland." Considering all of the evidence that has been presented to the Court at both the original hearing where testimony was presented by Carolyn Kvislen, Thomas Dillon, Bethany Kurz, Harold Dubbert, and Rod Ustipak; the testimony presented at the March 12<sup>th</sup> hearing; and all

exhibits from both hearings, including the appendices A, B, and C, and Exhibits #207 through #218, the Court finds that a portion of the 949 acres in Griggs County does not constitute farmland or ranchland. In making this determination, the Court has considered the nature of the land, including the topography of the soil of the various areas, in both Section 10 and Section 11. Specifically, the Court finds that the 84 acre wetland portion know as Fieberger Lake in Section 10 and 151 acres of successfully restored natural wetland in Section 11 do not meet the statutory definition of farmland or ranchland. Additionally, the Court finds that two smaller 16 acre restored wetlands set forth in the NE1/4 of both Sections 10 and 11 also do not constitute "farmland or ranchland." Since Crosslands did not need the approval of the Governor under N.D.C.C. 10-06.1-10(3), Crosslands is entitled to retain those 267 non-agricultural acres. The balance of the 949 acres does meet the definition of being farmland or ranchland.

### ANALYSIS FOR REASON 3

The remaining issue is whether or not Crosslands should be allowed to retain some of the farmland and ranchland adjacent to the 267 acres of land determined to not be farmland or ranchland to the extent the adjacent farmland or ranchland is "for uses supportive of or ancillary to adjacent non-agricultural land for the benefit of both parcels", pursuant to N.D.C.C. 10-06.1-07. The state and Crosslands disagree as to whether or not the provisions of N.D.C.C. 10-06.1-07 should apply to non-profit organizations which acquire land for the purpose of conserving natural areas and habitats for biota. The state's position is that Crosslands is limited to acquiring farmland or ranchland only in accordance with the provisions of N.D.C.C. 10-06.1-10 and in cases such as this involving a non-profit corporation established to conserve natural areas and



habitats, N.D.C.C. 10-06.1-07 does not apply. Crosslands agrees that in general before it may purchase farmland or ranchland it must obtain approval under N.D.C.C. 10-06.1-10(3), but that N.D.C.C. 10-06.1-07 provides a separate mechanism for it to obtain certain land normally used for farming or ranching, when the land is necessary for uses supportive of or ancillary to adjacent non-agricultural land for the benefit of both land parcels. In other words, the state's position is that N.D.C.C. 10-06.1-07 and N.D.C.C. 10-06.1-10 are mutually exclusive and that Crosslands' only remedy is to obtain approval under the latter section. Crosslands' position is that it should not be required to divest land which is otherwise used for farming or ranching if it meets the requirements set forth in N.D.C.C. 10-06.1-07, even if there has been no approval from the Governor under 10-06.1-10(3). There is no wording in the statute which directly provides that the two sections are mutually exclusive. The Court concludes that the two sections are not mutually exclusive. The Court is mindful that the state has argued that if this Court applies the "business purpose exception", it will essentially nullify the "conservation exception" set forth in N.D.C.C. 10-06.1-10. The concern by the state is that if the "business purpose exception" applies to conservation groups they will not bother with the NAAAC nor seek gubernatorial approval for their acquisitions. Again, while the Court understands the state's concern, the Court finds no language in either statute which would preclude Crosslands from pursuing a remedy under the business purpose exception in divestiture proceedings. The burden is still on Crosslands to show that farmland or ranchland is used in support of or ancillary to the adjacent non-agricultural land for the benefit of both land parcels in order to retain ownership of the farmland or ranchland. To the extent it can't do so, Crosslands must divest itself of such farmland or ranchland.

The land surrounding the 267 acres of non-agricultural wetlands consists of varying degrees of property which is both conducive and nonconductive to farming or agriculture. Normally, Crosslands would have to divest itself of the farmland or ranchland unless its uses are supportive or ancillary to the adjacent wetlands for the benefit of both parcels. Crossland suggested that the Court look at several factors including whether or not a particular tract of adjacent land is productive or nonproductive or farming purposes; whether the tract to be divested is sufficiently large that a farmer would be purchasing it; and whether the tract would assist Crosslands in carrying out its general purposes of providing habitat for ducks and other wildlife and complement the uses to which the retained natural wetlands would be put.

In its pre-hearing brief and through the exhibits and testimony presented at the March 12, 2009 hearing, Crosslands set forth a proposal for the Court to consider in light of those factors in determining whether or not any of the farmland or ranchland would fit within the business purpose exception of N.D.C.C. 10-06.1-07. First, Crosslands presented to the Court a plan which considered 40 acre tracts throughout the two sections covering the 949 acres. The plan showed the various field acreages; the restored wetlands acreage; existing wetlands acreage; and non-cropland acreage in both sections. The Court was also presented with information from both parties regarding the highly erodable land, extent of CRP land, and the soil types involved in the Griggs County land. The Court was also presented a productivity index based on soil types. Crosslands proposed that they be required to divest itself of approximately 276 acres in Section 10 and an additional 145 acres in Section 11. They would then keep the remaining acreage surrounding the 267 acres of wetlands on the basis that those acres would be supportive

of and ancillary to the wetlands and benefit both land parcels and fulfilling out and providing habitat for ducks and other wildlife. The Court finds the proposal set forth by Crosslands in their brief and as noted on Exhibit #218 and the other supporting documents does meet the business purpose exception of N.D.C.C. 10-06.1-07. Accordingly, the Court determines that Crosslands should not be required to be divested of all the farmland and ranchland, but shall divest itself of land in accordance with the following:

1. Crosslands shall divest itself of all of the NW1/4 of Section 10, except for the south 440 feet of the SW1/4NW1/4 where Crosslands buildings and storages areas are located and which divested land consists mostly of non-highly erodible and reasonably productive soils with productivity ratings in excess of 70 and is thus a sufficient size to be farmable. The part being retained by Crosslands, which contains the storage facilities for managing the Griggs County land, would thus assist in providing management and also provide cover and nesting area for wildlife in area adjacent to the lake.
2. In the SW1/4 of Section 10, Crosslands shall divest the south 990 feet of the SW1/4SW1/4. That area is the part that lies essentially south and east of Lake Fieberger, and consists of soils with a productivity index of over 70 and has been farmed in the past and readily accessible. Crosslands would retain the remaining acreage in the SW1/4 that bordered the lake. Those

areas are five small tracts which would provide buffering between adjacent farming operations and the lake and also provide excellent nesting and coverage habitat for ducks and other wildlife. Those lands are highly erodible and marginally productive lands.

3. In the NE1/4 of Section 10, Crosslands shall divest itself of the S1/2NE1/4 plus the south 300 feet of the N1/2NE1/4. Those areas have a productivity rating of 65 or more and substantial portions have been farmed in the past and this divested area would be readily accessible from the west and could be farmed as a single unit with the divested land in the NW1/4 of Section 10. Crosslands would thus be retaining approximately 60 acres in the NE1/4 of Section 10, which would include the restored 16 acres wetland, as well as the permanent 5 acres wetland in the northeast corner. Nearly all the retained land is classified as non-cropland.
4. In the SW1/4 of Section 11, Crosslands shall divest itself of the S1/2SW1/4SW1/4 and all of the SE1/4SW1/4 and the E1/3NE1/4 SW1/4. Most of this is a single contiguous tract in CRP and consists of marginally productive soil, with productivity ratings in the 50s and a small area in the southwest corner that consists of better soil, but is highly erodible. Because of the terrain, it would be sufficiently large to be

farmable. Crosslands shall retain the remaining land in the SW1/4. The restored wetland takes up most of that acreage. The strip of land immediately west of the lake would provide buffering from any farming operations to the west as well as nesting habitat and coverage for ducks and other wildlife that would be using the wetland. There are several small triangular tracts in the NE1/4SE1/4 that Crosslands is retaining which also would provide buffering and would be a suitable habitat that Crosslands could use in carrying out its purpose.

5. Crosslands shall retain all of the NW1/4 in Section 11 which consists primarily of the 151 acre restored of wetland. The land to the north of the wetland is non-cropable G362A saline wetland soil, which is unsuitable for much of anything. The strip of land in the NW1/4 of Section 11 which lies to the west of the wetland would also provide buffering and habitat and is only marginally productive.

6. In the NE1/4 of Section 11, Crosslands shall divest itself of all of its interest in the NE1/4NE1/4, the east 440 feet of the SE1/4NE1/4, and the S1/2SW1/4NE1/4. The divested land consists of highly erodible soils but for the most part are reasonably high productivity ratings and currently are in CRP. Crosslands shall be allowed to keep the balance of the NE1/4. The NW1/4NE1/4 is essentially all non-cropland. The 16 acres

restored wetland takes up a large portion of the N1/2SW1/4NE1/4 as well as the W2/3SE1/4NE1/4 and would provide convenient habitat for ducks and other wildlife using any of the wetland areas, as well as providing buffering between the restored natural wetlands and any farming operations on the divested land.

The Court finds that the above divestiture proposal complies with the requirements of the business purpose exception in N.D.C.C. 10-06.1-07 and Crosslands may retain the farmland and ranchland as noted and must divest itself of the other land as also noted. In accordance with N.D.C.C. 10-06.1-07, Crosslands shall make available, to be leased by persons who farm or ranch as sole proprietorships or farm partnerships or by corporations or limited companies, any such land when not being immediately used for any purpose of the Crosslands Corporation.

#### CAVALIER COUNTY PROPERTY

On December 31, 2004, Crosslands acquired 480 acres of Cavalier County land, located in the N1/2 of Section 25-159-62 and SE1/4 of Section 24-159-62. There is no dispute that Crosslands acquired the properties for the purpose of maintaining and preserving natural areas and habitat for migratory waterfowl and other wildlife, just as it had in Ward and Griggs Counties. As noted previously, there is no dispute that N.D.C.C. 10-06.1-10(3) requires the Governor to approve any purchases of farmland and ranchland by non-profit corporations. The parties have stipulated that at the time of Crosslands' acquisition, the Cavalier County land, which included some existing wetlands, was farmland or ranchland and therefore, the acquisition was subject to the provisions of

N.D.C.C. 10-06.1-10. There is no dispute that Crosslands submitted to the state an “acquisition proposal” for the Cavalier County land in October of 2004. A public hearing on that application was held November 17, 2004. Only one of the seven designating statutory members of NAAAC was present at the hearing but four of the absent members did send representatives from their agencies. On December 2, 2004, NAAAC held a meeting to consider the application. All the members participated in person or by phone. The committee voted to recommend the Governor not approve the acquisition. On December 23, 2004, Governor Hoeven sent a letter to Crosslands informing it that he would not approve the application to acquire the Cavalier County land.

First, based on the parties’ stipulation number 37, set forth in the December 21, 2006 stipulation, the Court determines that the Cavalier County land did constitute ranchland or farmland, even though it included existing wetlands. The Court further determines that based on that stipulation the acquisition was subject to N.D.C.C. 10-06.1-10(3). The Court, in making this determination, finds that the stipulation of the parties that the Cavalier County land constituted farmland or ranchland is conclusive regardless of the information presented by Mr. Duebbert and Bethany Kurz regarding the lands in certain areas of the Cavalier purchase being classified as wetlands. The Court is also mindful that there was no such stipulation regarding the Griggs County land in which this Court has made the factual determination regarding the fact that only a portion of the Griggs County land constitutes ranchland or farmland.

Crosslands also contends that there was a procedural flaw in violation of the statutory directive and that such flaw should invalidate the procedure. Specifically, only one of the seven members of the NAAAC committee was present during the November

17, 2004, public hearing regarding Crosslands' application. Crosslands also contends that there are no standards controlling the Governor's decision to allow or disallow particular acquisition of farmland or ranchland under N.D.C.C. 10-06.1-10(3). Crosslands contends without a set of standards the Governor may reject any application for any reason he wants or for no reason at all. Crosslands requests that the statutory section be stricken as inherently arbitrary and capricious until the Legislature, by statutory change or the Executive Branch through regulations, develops some standards to be used by the Governor in determining whether or not to approve or deny an application by a non-profit corporation to acquire farmland or ranchland in the state.

The state contends that the November public hearing was not a decision making event and that since no decision was made a quorum wasn't required. The state further points out that when NAAAC met in Bismarck on December 2, 2004, all members participated in person or by phone. The committee, at that meeting, voted to recommend that the Governor not approve the acquisition. On December 23, 2004, Governor Hoeven sent a letter to Crosslands informing it that he would not approve the application. The Court has reviewed the December 8, 2004, letter from Roger Johnson, Chair of the NAAAC, to Governor Hoeven. That letter included the minutes from the November 17, 2004, hearing. The Court has also reviewed Governor Hoeven's December 23, 2004, letter to Crosslands denying the application and informing them of the reasons for such denial. (See Exhibits 31, 32, and 33). Based on that review, the Court finds no procedural error which would invalidate the Governor's decision exempting Crosslands from the law or that N.D.C.C. 10-06.1-10(3) should be stricken as inherently arbitrary and capricious. The state having shown that there was a proper procedural and



substantive compliance by the state in accordance with N.D.C.C. 10-06.1-10(3) and that Governor Hoeven's decision to deny the application to purchase land was not arbitrary and capricious and based on a proper application of the statute, the state's request for an order from the Court that Crosslands divest itself from the Cavalier County land is granted. In accordance with N.D.C.C. 10-06.1-24, Crosslands shall divest itself of the Cavalier County land on or before February 1, 2010. Crosslands shall pay a civil penalty of \$20,000.00 if it fails to comply with the Court's order and may be dissolved or terminated by the Secretary of State.

#### CONSTITUTIONAL ISSUE – DORMANT COMMERCE CLAUSE

##### ANALYSIS

Crosslands contends that North Dakota's corporate farming legislation set forth in N.D.C.C. Chapter 10-06.1, in general, and N.D.C.C. 10-06.1-10, in particular, violates what is commonly called the "dormant" commerce clause of the United States Constitution. Crosslands' position is that the North Dakota corporate farming statutes set up a discriminatory process which is essentially identical to versions in the states of Nebraska and South Dakota which were declared unconstitutional by the Eighth Circuit Court of Appeals. Crosslands relies specifically on South Dakota Farm Bureau, Inc. v. Hazeltine, 340F.3d 583(8<sup>th</sup> Cir. 2003) Cert. denied 124 S. Ct. 2095(U.S. 2004) and Jones v. Gale 470F.3d 1261(8<sup>th</sup> Cir. 2006) Cert. denied 127 S. Ct. 1912 (U.S. 2007)

The state acknowledges the above two Eighth Circuit cases but striking down the Nebraska and South Dakota corporate farming laws, but argues that neither case is conclusive as it relates to North Dakota's corporate farming law; and that Crosslands' argument overreaches and ignores other state and federal cases and concludes that neither

Jones nor Hazeltine deserve much deference by this Court. Both the state and Crosslands have submitted extensive briefs setting forth their positions as it relates to the constitutional issue under the commerce clause. For reasons set forth below, the Court finds that North Dakota's anti-corporate farming legislation set forth in N.D.C.C. Chapter 10-06.1, and specifically N.D.C.C. 10-06.1-10, and N.D.C.C. 10-06.1-07, as it applies to Crosslands or other non-profit organizations acquiring farmland or ranchland for the purposes of conserving natural areas and habitat for biota, does not violate the dormant commerce clause of the United States Constitution.

Article 1, ¶ 8 of the United States Constitution includes the commerce clause, which grants congress the authority to regulate commerce of foreign nations, among several states, and with the Indian tribes. That commerce clause does not speak directly to the individual sovereign authority of each state to regulate its commerce. The Tenth Amendment to the U.S. Constitution provides that powers not specifically delegated to the United States are reserved to the states. However, the state does not take issue with the fact that the commerce clause has been interpreted by both state and federal Courts to restrain, in certain situations, the state's authority regarding commerce. Since there is no direct language regarding restrictions on the states set forth in the commerce clause, it has become known as the "negative" or "dormant" aspect of the commerce clause. Essentially, it is to avoid what is commonly called "economic balkanization" and to assure that the states do not discriminate by providing "differential treatment" of in-state and out-of-state economic interests that benefits the former and burdens the latter. (See Granholm v. Held and Oregon Waste Systems, Inc. v. Dep't of Env'tl. Quality, 511 U.S. 93, 99 (1994).

The Court agrees with the underlying principles set forth by the state in its brief (on Page 15) that statutes are presumed constitutional and that Crosslands has the burden to prove the unconstitutionality, which must be beyond a reasonable doubt, and that all doubts are resolved in favor of constitutionality.

The Court has reviewed the recent ALR article regarding “validity, construction, and application of state constitutional and statutory provisions regarding corporate farming.” 25ALR 5<sup>th</sup> 147. That ALR article extensively discusses the various aspects regarding the validity of constitutional and statutory corporate farming laws. It cites many cases under various constitutional challenges including those under the “dormant” commerce clause, equal protection clause, due process clause, privileges and immunities clause, contract clause, federal statutory law conflicts and state law conflicts. It also reviews such other issues including standing to challenge the laws, jurisdiction, retroactive application, and res judicata. Numerous North Dakota cases are cited in that article. It also has an extensive review of both the Jones and Hazeltine cases. In reviewing the Hazeltine decision regarding the South Dakota corporate farming statute, it is noted the Eighth Circuit focused only on the plaintiff’s argument that the statute violated the “dormant” commerce clause because they impermissibly discriminated against interstate commerce. Specifically, it noted that the Hazeltine Court focused solely on whether the evidence in the record established a “discriminating purpose” underlying the statute and that the Court did not consider whether the statute was “facially discriminatory” against out-of-state interests or “arbitrarily discriminate” against interstate commerce. In analyzing the Jones case, it was noted that the Eighth Circuit found that the statute violated the “dormant” commerce clause statute because it was

“discriminatory on its face” and that it favored Nebraska residents and people in close proximity with their family farms or ranches and that the statute’s purpose was discriminatory, inasmuch as it prohibited further purchases of agricultural land by any corporation, other than a Nebraska family farm corporation. Certiorari to the U.S. Supreme Court was denied on both cases.

Dormant commerce clause challenges involve two different lines of analysis:

A. First, whether the particular law discriminates against interstate commerce. In that regard the laws could be discriminatory in three different ways:

1. It could be “facially discriminatory”;
2. The statute’s “purpose” could be discriminatory; or
3. The statute could have a discriminatory “effect”

B. The second line of analysis by which state laws may be challenged under the dormant commerce clause, in the event it does not discriminate against interstate commerce under one of the above three noted ways, is that the law can be stricken down if the burden that it imposes on interstate commerce is “clearly excessive in relation to its putative local benefits.” See C & A Carbone, 511 U.S. 383, 390, and 392.

Under the above analysis, the first issue is whether or not there is any showing that the North Dakota corporate farming law discriminates on its face against interstate commerce. The Court agrees with the state’s analysis that North Dakota’s prohibition on corporate land ownership is essentially all-encompassing, not selective, and not discriminatory. The Court is mindful that there have been exceptions built into the North Dakota law, including the surface coal mining exception, business purpose exception, cooperative corporations exception, non-profit organizations or trusts exception, and the

conservation of natural areas and habitats exception for non-profit organizations, such as Crosslands. While North Dakota's law is similar to Nebraska's, which was struck down in the Jones case, they are not exactly the same. It does not require persons to reside on the farm as long as there is an actively engaged person operating the farm or ranch. Thus, it is more flexible than Nebraska's law. The Court does not find that there is any facial discrimination.

The second analysis considers whether there is any discriminatory "purpose." Crosslands contends that North Dakota's farming legislation has discriminatory purpose based on differing treatment designed to benefit in-state economic interests at the detriment of out-of-state economic interests. The state does not dispute that Crosslands is right when it asserts that the North Dakota corporate farming law is enacted to further North Dakota's interest and is thus, "local." However, the state does not believe that that objective alone implicates the dormant commerce clause. There still must be a showing that there is a discriminatory purpose. In other words, there must be an attempt to burden out-of-state economic interests to the benefit to in-state economic interests. The state points out, in its brief, a lengthy analysis of the historical attempts in adopting the corporate farming law, starting in 1932. The Appendices of Exhibits contains numerous articles presented by the state as evidence that the law does not have a discriminatory purpose under the dormant commerce clause to unduly burden out-of-state economic interest to the benefit of local economic interests. A review of the record in this case and the information presented regarding the underlying purpose of the corporate farming law, it shows no discriminatory basis between in-state and out-of-state interests. The Court

finds that like the record in Hazeltine there is no showing that the North Dakota corporate farming law was enacted with a discriminatory purpose.

The third analysis under the dormant commerce clause is to determine if there's been any discriminatory effect regarding implementation of the corporate farming law. The state contends it applies N.D.C.C. 10-06.1-10 even-handedly between corporations whether they are in-state or out-of-state. In this case, the Court notes that Crosslands itself is a North Dakota corporation, not an out-of-state corporation. Crosslands still contends that the statute has an adverse affect on it even though it does not conduct corporate farming operations. In particular, it contends that N.D.C.C. 10-06.1-10 unduly restricts, in a severe manner, Crosslands' ability to acquire potential wildlife habitat that in-state family farming corporations and local individual farmers or large farming partnerships can acquire with no problem, and then use for the same purposes of promoting wildlife habitat if they desire to do so. Crosslands contends that the specific procedures set forth in N.D.C.C. 10-06.1-10(3) give local farm and ranch family corporations much greater preference than corporations such as Crosslands. The state points out that adverse affects alone do not trigger the commerce cause but only unlawful deferential treatment. *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Aut.*, 127 S. Ct. 1786, 1792 (2007). The state also points to the recent case involving out-of-state hunters coming to North Dakota from Minnesota where a District Court ruled that hunters coming to North Dakota are not engaged in economic activity, but in recreation. See *Hatch v. Hoeven*, 370 F. Supp. 2d 960, 969-71.

In summary, while there is no doubt that the statutory requirements set forth in North Dakota's corporate farming law have restrictions and there is no doubt that

Crosslands feels that it is not necessary to have those restrictions, the Court agrees with the state that the state is entitled to make policy decisions that the state finds is the proper balance between conservation and agriculture. The Court concludes that North Dakota's corporate farming law does not discriminate against interstate commerce because of any discriminatory affect on corporations such as Crosslands or other such similar corporations.

Since the Court has not found that the law discriminates against interstate commerce under any of the three analyses set forth in the first tier, it is necessary to address the second tier analysis as to whether or not the North Dakota corporate farming law should be stricken on the basis it imposes a burden on interstate commerce that is clearly excessive in relation to its putative local benefits. See Hazeltine, 340 F 3d at 593. This is essentially a balancing test. Both Crosslands and the state presented experts regarding the efforts of Crosslands in regard to restoring wetlands. Crosslands presented the testimony of Bethany Kurz and Harold Duebbert, together with Rod Ustipak, one of the corporation's board of directors, and an active participant in seeking out and managing land areas for Crosslands. The state presented a report by Dr. Curtis Stofferahn regarding how effectively the corporate farming laws promote local farming economy, including preserving family farms and rural economy and that such constitute both state and national legitimate interests. The state acknowledges that congressional support for family farms alone does not authorize the state to enact discriminatory legislation but does confirm that in protecting North Dakota's agricultural heritage, the state's interest is significant and the dormant commerce clause should not be extended beyond its essential core. The state contends that Dr. Stofferahn's report is careful and

comprehensive and sets forth three areas of adverse consequences involved when farming becomes industrialized and thus have negative impacts on communities. The state's ultimate position is that it has legitimate interests in preserving family farms in rural communities and that those interests are furthered by North Dakota's corporate farming laws and that Crosslands has not presented any proof that any burden North Dakota's corporate farming law has on interstate commerce exceeds the laws of local benefits. The Court agrees with that analysis and finds that there has been no constitutional discrimination, since any burden imposed on interstate commerce is not clearly excessive in relations to the laws local benefits. A review of the ALR article regarding the validity, construction, and application of state constitutional and statutory provisions regarding corporate farming laws confirms that North Dakota's corporate farming law has withheld numerous constitutional challenges over the years and that the U.S. Supreme Court has found no violation of equal protection, due process, privileges and immunities, and contract clauses. The Court finds that the North Dakota law is distinguished from those in Nebraska and South Dakota and that this Court is not bound by the decisions in either the Jones or Hazeltine decisions of the Eighth Circuit Court of Appeals. The Court also notes that neither the North Dakota Supreme Court nor the U.S. Supreme Court has any case law binding on this Court as it relates to the issue of whether or not there has been a violation of the dormant commerce clause. The Court concludes that the North Dakota corporate farming legislation, as it applies to Crosslands or other non-profit organizations acquiring farmland or ranchland for purposes of conserving natural areas and habitat for biota, does not violate the dormant commerce clause of the United States Constitution.

#### **THE COURT'S DETERMINATION AND FINAL DIVESTITURE ORDER**



In accordance with the law and analysis set forth in the above Memorandum Decision, the Court determines and ORDERS AS FOLLOWS:

1. The 320 acres of farmland in **Ward County** were gifted to Crosslands and thus N.D.C.C. 10-06.1-10(3) does not apply to that acquisition since it was not a purchase. The State's request for an order from the Court that Crosslands divest itself with regard to the Ward County property is **denied**.
2. The state has shown that there was proper procedural and substantive compliance by the state in accordance with N.D.C.C. 10-06.1-10(3), as it relates to Crosslands' applications to purchase the **Griggs County and Cavalier County** land.
3. Governor Hoeven's decision to reject Crosslands' application to purchase the **Griggs County** land, on the grounds that the application was retroactive invalid, was proper and in accordance with the statute and does not constitute an arbitrary and capricious decision.
4. The 949 acres in **Griggs County** was purchased by Crosslands in 2003, without first satisfying the purchase acquisition requirements set forth in N.D.C.C. 10-06.1-10(3). To the extent that the Griggs County land purchased was "ranchland or farmland", Crosslands will have to divest itself of such "ranchland or farmland" in accordance with N.D.C.C. 10-06.1-24, since such purchase is in violation of the purchase acquisition requirements of N.D.C.C. 10-06.1-10(3) and Governor Hoeven's decision to disapprove the acquisition plan. However, as determined in

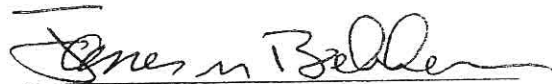
the above Memorandum Decision, the Court has found that 267 acres in Griggs County are of such a nature, based on its being semi-permanent wetlands and/or highly eroded land, that it could not be used for farming or ranching under the definition in N.D.C.C. 10-06.1-01(1), and thus would not constitute "farmland or ranchland" for purposes of N.D.C.C. 10-06.1-10. Crosslands does not have to divest itself of those 267 non-agricultural acres. The Court has also determined in the Memorandum Decision that a portion of the "farmland or ranchland" should be allowed to be retained by Crosslands as it constitutes acreage immediately adjacent to the non-agricultural wetlands and highly eroded lands in Griggs County under the "business purpose exception" in N.D.C.C. 10-06.1-07. The state's request for an order from the Court that Crosslands divest itself of the Griggs County land is **granted** in part and **denied** in part as set forth in the Court's Memorandum Decision.

5. The decision by Governor Hoeven to deny the application filed by Crosslands to purchase the **Cavalier County** land pursuant to N.D.C.C. 10-06.1-10(3) was not arbitrary and capricious and was based on a proper application of the statute. Since the Governor did not approve the application, Crosslands will have to divest itself of the Cavalier land, as it purchased such land in violation of N.C.C.C. Chapter 10-06.1-10(3). Accordingly, the state's request for an order from the Court that Crosslands divest itself of the Cavalier County land is **granted**.

6. In accordance with N.D.C.C. 10-06.1-24, on or before February 1, 2010, Crosslands shall divest itself of all the Cavalier County land and that portion of Griggs County land noted in the Court's Memorandum Decision. Crosslands shall pay a civil penalty of \$20,000.00 if it fails to comply with the Court's order and may be dissolved or terminated by the Secretary of State.
7. The North Dakota anti-corporate farming legislation set forth in N.D.C.C. Chapter 10-06.1, and specifically N.D.C.C. 10-06.1-10, and N.D.C.C. 10-06.1-07, as it applies to Crosslands or other non-profit organizations acquiring farmland or ranchland for purposes of conserving natural areas and habitat for biota, does not violate the dormant Commerce Clause of the United States Constitution.

Dated this 5<sup>th</sup> day of June, 2009.

By the Court:



James M. Bekken  
District Judge

Original: Court File  
cc: Charles M. Carvell, Attorney for the Plaintiff  
C. Nicholas Vogel, Attorney for the Defendant